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6 **IN THE SUPREME COURT**
7 **STATE OF ARIZONA**
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9
10 PETITION TO AMEND ARIZONA
11 RULES OF CIVIL PROCEDURE BY
12 AMENDING RULE 68(h) AND
13 ADOPTING RULE 74(g)

Supreme Court No. _____

**Petition to Amend Arizona
Rules of Civil Procedure by
Amending Rule 68(h) and
Adopting Rule 74(g)**

14 Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar
15 of Arizona hereby petitions this Court to amend Rules 68(h) and 74 of the Arizona
16 Rules of Civil Procedure (1) to clarify that offers of judgment may be made in cases
17 subject to compulsory arbitration or otherwise referred to arbitration by agreement
18 of reference, and (2) to delineate procedures governing the operation of offers of
19 judgment made in advance of an arbitration hearing.

20 The State Bar believes that offers of judgment can be helpful in resolving
21 civil disputes, including those subject to arbitration and governed by Rules 72
22 through 77 of the Arizona Rules of Civil Procedure ("Arbitration Matters").
23 However, while the Rules of Civil Procedure do not expressly prohibit the use of
24 offers of judgment in advance of an arbitration hearing, neither do they encourage
25 them: (1) the Rules are unclear as to whether an offer of judgment may be made in
26 an arbitration proceeding; (2) the deadlines set forth in Rules 68(a) and (h) for

1 serving an offer of judgment are tied to “trials” and not arbitration hearings,
2 creating a trap for the unwary, and, in some circumstances, giving an offeree a
3 perverse incentive not to settle a case before an arbitration hearing; and (3) it is
4 unclear whether the outcome of an arbitration hearing may be considered in
5 determining sanctions under Rule 68(g) because arbitrators render “awards” and not
6 “judgments.”

7 Attached as Appendix “A” are redlined versions of proposed amendments to
8 Rule 68(h) and a new proposed Rule 74(g) which are intended to address these
9 deficiencies.

10 **Rationale Supporting Adoption of the Proposed Amendments**

11 In 2007, Rule 68 was substantially revised to permit, among other things, the
12 making of joint offers and apportioned offers. The State Bar believes that the 2007
13 revisions to the Rule have increased the frequency with which offers of judgment
14 are made and promoted the pretrial resolution of civil disputes, and that the use of
15 offers of judgment in advance of arbitration hearings would serve the same purpose.

16 Unfortunately, Rule 68 and the rules governing arbitration (Rules 72 through
17 77) are like two ships passing in the night: Rule 68 makes no specific mention of
18 arbitration hearings, and Rules 72 through 77 nowhere refer to offers of judgment.
19 This creates three impediments to the use of offers of judgment in advance of
20 arbitration hearings:

21 *First*, it is unclear whether offers of judgment can be made in Arbitration
22 Matters. This ambiguity in Rule 68 affects not only proceedings subject to
23 compulsory arbitration, but also to matters where the parties to a contract have
24 agreed to resolve disputes through arbitration and have incorporated by reference
25 Rules 72-77 of the Arizona Rules of Civil Procedure as the procedural rules
26 governing the proceeding.

1 **Second**, the deadlines for making offers of judgment are not affected by the
2 setting of an arbitration hearing, creating a trap for an unwary offeror and
3 sometimes undercutting a receiving party's incentive to accept an offer based on the
4 uncertainty of a hearing's outcome. In a civil action that is not subject to
5 arbitration, Rule 68(a) provides that an offer may not be made if thirty days or less
6 remain before trial, and Rule 68(h) provides that an offer made within forty-five
7 days of trial remains effective for only fifteen days. The combination of these rules
8 ensures that the receiving party cannot wait until after trial to decide whether to
9 accept an offer, which would defeat the Rule's purpose in encouraging settlement
10 before trial.

11 In contrast, because arbitration hearings are not "trials" within the meaning
12 of Rules 68(a) and (h), offers of judgment served in advance of an arbitration
13 hearing are subject merely to the thirty-day expiration period set forth in
14 Rule 68(h). An offering party may not realize that fact and make an offer twenty
15 days before an arbitration hearing under the mistaken belief that under Rule 68(h),
16 the offer will expire after fifteen days. The party receiving such an offer could then
17 wait until ten days after the hearing to decide whether to accept it. That would
18 defeat the Rule's purpose in giving a party an incentive to settle in advance of the
19 hearing, and, indeed, would encourage the offeree not to settle before the hearing
20 because the offer would "cap" the party's exposure to an unfavorable outcome.

21 **Third**, Rule 68 is unclear about whether the offering party is entitled to a
22 sanction if the arbitration award is "less favorable" to the offeree than the offer.
23 Rule 68(g) provides that an offering party is entitled to a sanction if an offer is
24 rejected and the offeree "does not later obtain a more favorable judgment." But
25 arbitrators render "awards," not "judgments." Ariz. R. Civ. P. 76(a). Moreover, an
26 arbitration award may or may not ultimately result in the entry of a judgment.

1 Thus, if no appeal is taken on an arbitration award, a judgment may be entered on
2 the award. Ariz. R. Civ. P. 76(c). But, if an award is appealed, no judgment may
3 be entered based on the arbitration award. *Id.* Rather, a *de novo* appeal to the
4 Superior Court ensues, presumably resulting in a judgment or other resolution
5 before the assigned trial court. Ariz. R. Civ. P. 77(a). In any event, as either of
6 these alternative courses requires affirmative action by the prevailing party or the
7 court before a judgment is entered, it is unclear whether an arbitration award may
8 be considered for the purpose of applying Rule 68(g).

9 To remedy these ambiguities in the Rules, the State Bar recommends the rule
10 changes shown in Appendix A:

11 **First**, to clarify that offers of judgment may be made in Arbitration Matters,
12 proposed Rule 74(g) expressly authorizes such offers to be made in such
13 proceedings. It also states that unless Rule 74(g) provides otherwise, the provisions
14 of Rule 68 apply to all offers of judgment made in Arbitration Matters. The State
15 Bar also proposes amending the title to Rule 74 to include a reference to offers of
16 judgment to highlight that such offers may be made in connection with Arbitration
17 Matters.

18 **Second**, to prevent practitioners from mistakenly assuming that the fifteen-
19 day expiration period in Rule 68(h) applies to arbitration hearings and to incentivize
20 the parties to use the offers of judgment in advance of such hearings, proposed
21 Rule 74(g) provides that: (i) an offer of judgment may not be made if thirty days or
22 less remain before a scheduled arbitration hearing; (ii) an offer made within forty-
23 five days of the hearing is effective for only fifteen days; and (iii) if an offer is
24 made more than forty-five days before the hearing, the expiration of the period is
25 governed by the periods prescribed in Rule 68(h) (i.e., either thirty days, or, if made
26 within sixty days of the service of the summons, sixty days). To facilitate this rule

1 change, Rule 68(h) also would be amended to specify that an offer that is made
2 within forty-five days of an arbitration hearing would remain effective as is
3 provided in Rule 74(g).

4 **Third**, to clarify the extent to which arbitration awards should be taken into
5 account in deciding whether sanctions are appropriate under Rule 68(g), proposed
6 Rule 74(g) specifies that the Rule 68(g) determination “shall be made by reference
7 to the favorability of any judgment entered either on an award pursuant to
8 Rule 76(c) or on an appeal of an award pursuant to Rule 77.”

9 **Fourth**, to prevent a party from attempting to serve an offer of judgment
10 during the period between the thirty-day deadline before an arbitration hearing and
11 the filing of a notice of appeal of an arbitration award, proposed Rule 74(g)
12 expressly prohibits service of an offer after the thirty-first day before the hearing
13 “*unless and until* a notice of appeal is filed pursuant to Rule 77(a).” (Emphasis
14 added).

15 Conclusion

16 The State Bar of Arizona respectfully requests that the Court amend the
17 Arizona Rules of Civil Procedure by amending Rule 68(h), amending the title to
18 Rule 74, and adopting proposed Rule 74(g) as shown in Appendix A.

19 RESPECTFULLY SUBMITTED this 15th day of June, 2010.

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22 John A. Furlong
23 General Counsel

24 Electronic copy filed with the
25 Clerk of the Supreme Court of
26 Arizona this 15th day of June, 2010.

By: Kathleen Lundgren

APPENDIX “A”

Proposed Rule Changes

(Petitioner's proposed changes shown with additions identified by underscoring and deletions identified by ~~"strike-through"~~).

Rule 68. Offers of Judgment

(h) Effective Period of Offers; Subsequent Offers; Offers on Damages. An offer of judgment made pursuant to this Rule or Rule 74(g) shall remain effective for 30 days after it is served, except that (i) an offer made within 60 days after service of the summons and complaint shall remain effective for 60 days after service, ~~and~~ (ii) an offer made within 45 days of trial shall remain effective for 15 days after service, and (iii) an offer made within 45 days of an arbitration hearing conducted pursuant to Rule 74(b) shall remain effective as provided for in Rule 74(g). If the effective period is enlarged by the court, the offeror may withdraw the offer at any time after expiration of the initial effective period and prior to acceptance of the offer. The fact that an offer has been rejected does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not fewer than 10 days before the commencement of hearings to determine the amount or extent of liability.

Proposed Rule Changes

(Petitioner's proposed changes shown with additions identified by underscoring and deletions identified by ~~"strike-through"~~).

Rule 74. Powers of Arbitrator; Scheduling of Arbitration Hearing; Permitted Rulings by Arbitrator; Time for Filing Summary Judgment Motion; Receipt of Court File; Settlement of Cases; Offer of Judgment.

(g) Offer of Judgment. At any time more than 30 days before the arbitration hearing begins, any party to an action either subject to compulsory arbitration under A.R.S. § 12-133 and these rules or referred to arbitration by Agreement of Reference may serve upon any other party an offer of judgment pursuant to Rule 68. No offer of judgment may be served after that deadline unless and until a notice of appeal is filed pursuant to Rule 77(a). Except as otherwise provided herein, the provisions of Rule 68 shall apply to any offer of judgment made in any such action. An offer made within 45 days of the arbitration hearing shall remain effective for 15 days after service. The determination as to whether a sanction shall be imposed upon a party pursuant to Rule 68(g) shall be made by reference to the favorability of any judgment entered either on an award pursuant to Rule 76(c) or on appeal of an award pursuant to Rule 77.